



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 20, 1995

Ms. Martha C. Wright  
Wright & Associates  
P.O. Box 53177  
Grand Prairie, Texas 75053-1777

OR95-069

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 26220.

The Grand Prairie Independent School District (the "district") has received a request for information regarding the employment files of certain employees and certain student testing information. You state that the requestor asked for six separate items. You have responded by disclosing four of those documents; however you suggest that the remaining items are excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.111, and 552.114 of the act. You ask that we specifically consider the following:

Request No. 1: Attendance records of Marilyn Crawford from the beginning of her employment with the GPISD to the present, by year, including short leaves, business leaves, professional leaves, and all days off campus for any reason whether a substitute was needed or not.

Request No. 2: Attendance record, including all types of absences from duty mentioned in #1, above, of Mr. Dwayne Farr, drafting teacher at SGPHS, during his final year of employment before retirement (1991-92 school year).

Request No. 3: Attendance record including all types of absences from duty mentioned in #1, above, of Eddie Patton during his final year of employment with the district prior to his retirement.

Request No. 6: Copies of any and all documentation related to the disciplinary action taken against Lee Middle School teacher James Kenwood Ward resulting in his suspension without pay as a result of an incident during the 1992-93 school year concerning Mr. Ward's use of profanity directed to a student in his shop class.

Section 552.101 of the act incorporates the confidentiality requirements of other statutory provisions to except "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You suggest that the requested documents should be excepted from required public disclosure because they contain medical information that may be excepted under common-law privacy. Common-law privacy applies to information when its disclosure would constitute the common-law tort of invasion of privacy through the disclosure of private facts. A governmental body must withhold information from required public disclosure if it meets the criteria the Texas Supreme Court articulated for common-law privacy in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Id.* at 685.

Under the standard for common-law privacy, some, but not all, medically related information is excepted from required public disclosure. Open Records Decision No. 478 (1987) at 3; *see also* Attorney General Opinion H-390 (1974). For example, common-law privacy does not protect the fact that a public employee is ill or injured; the mere fact of an illness or injury is not highly intimate or embarrassing. *See* Open Records Decision No. 600 (1992) at 7-8. Moreover, this office has concluded that even some specific information concerning an illness or injury is not highly intimate or embarrassing. Open Records Decision No. 422 (1984) at 1. This conclusion was based on the premise that information revealing that an individual was the victim of a self-inflicted gun-shot wound would not be highly intimate or embarrassing, but any details beyond the mere fact that the wound was self-inflicted, would necessarily indicate that the individual was suffering from some sort of mental distress, which would be highly intimate or embarrassing. *Id.* at 2. Therefore, any such information would be excepted from disclosure by common-law privacy. Other types of highly intimate or embarrassing medical information include information that relates to a drug overdose, acute alcohol intoxication, obstetrical care, gynecological illness, or convulsions or seizures. *Id.* at 1; 370 (1983) at 2; 237 (1980) at 1. Whether such information consists of highly intimate or embarrassing facts, must be determined on a case-by-case basis. In this particular instance we conclude that to the extent that the requested information reveals the mere fact of an illness or injury, it is not excepted from required public disclosure under the act.

You also assert that section 552.102 excepts the requested information from required public disclosure. Section 552.102 provides an exception for a certain type of information contained in a personnel files. More specifically, it pertains to information

“the disclosure of which would constitute a clearly unwarranted invasion of privacy . . . .” Similarly, the *Industrial Foundation* test for information deemed confidential by section 552.101 is also employed to determine confidentiality under section 552.102. The proper way to address this question would be to discern whether the release of the requested information would constitute an invasion of privacy, applying the privacy tort of public disclosure of private facts; if so, then the substance of the request should remain confidential. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, ref’d n.r.e.). Having examined the documents that you have submitted, we conclude that the release of the requested information will not result in the commission of the tort of public disclosure of private facts; therefore section 552.102 of the act does not except the requested information from required public disclosure.

We now turn to section 552.111 of the Government Code, which authorizes a governmental body to withhold from a requestor “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the statutory predecessor to section 552.111 and concluded that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. In addition, this office concluded that an agency’s policymaking functions do not encompass internal administrative or personnel matters. Open Records Decision No. 615, at 5-6. Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.* The information at issue was created in connection with the district’s disciplinary action against a district employee. As such, the information which you have submitted relates to a personnel matter. Hence, we conclude that section 552.111 does not except the requested information from required public disclosure.

In your final assertion you state that section 552.114 excepts the information at issue in Request Number 6 from required public disclosure. This section applies if such information is in a student record at an educational institution funded wholly or in part by state revenue. In addition, section 552.026 of the act incorporates the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. §1232g, into the act. FERPA prohibits an educational institution that receives federal revenue from releasing “educational records” without written consent. *Id.* § 1232g(b)(1). “Educational records” are defined as records that contain information directly related to a student and that are maintained by an educational institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” Open Records Decision No. 332 (1982); 206 (1978). This office generally applies the same analysis under section 552.114. Open Records Decision No. 539 (1990).

The requested information consists of a communication to a district employee advising him of disciplinary action to be taken against him for certain activities as summarized in the communication and a set of handwritten notes of comments made by

the students present at the alleged incident of misconduct. In Open Records Decision No. 372 (1983), this office concluded that information indicating disciplinary action against a public employee is public information. *See id.* However, we caution that while a compilation of the students' comments may be disclosed to the public, any notes or comments which tend to identify a particular student must be withheld from required public disclosure. *See* Open Records Decision No. 327 (1982); *see also* Open Records Decision No. 167 (1977). We have marked the type of information that identifies or tends to identify the students that you must withhold in those records that must be released to the requestor.

Furthermore, you state in your request letter that you are withholding certain records responsive to "Request No. 7" received by your office. In that request, you were asked to provide the

[l]ist of any and all TAAS and NAPT test scores, or a listing of success/failure rates without corresponding student names, of James Kenwood Ward's students for the last two years.

You state that such records may not be released pursuant to section 35.030 of the Texas Education Code. We agree. This provision unambiguously states that

[t]he results of individual student performance on academic skills assessment instruments administered under this subchapter are confidential and may be made available only to [certain parties]. However, overall student performance data shall be aggregated by grade level, subject area, campus, and district and made available to the public, with appropriate interpretations . . . . *The information may not contain the names of individual students or teachers. . . .* [Emphasis added.]

Educ. Code § 35.030(b).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Toya Cirica Cook  
Assistant Attorney General  
Open Government Section

TCC/LRD/rho

Ref.: ID# 26220

Enclosures: Marked documents

cc: Mr. John C. Pogue  
1410 Paris Drive  
Grand Prairie, Texas 75050  
(w/o enclosures)